IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 2614 OF 2006

BOMAB RUSTOM IRANI)
Residing at Keystone Group)
Rustomjee Acres, Rustom Irani)
Marg, Dahisar (W) MUMBAI 400 068 ..PETITIONER

Vs.

1. THE STATE OF MAHARASHTRA)
2. SHAGUFTA ADI HAUBRICH a.k.a.
SHEGUFA ADI IRANI)
citizen of United State of)
America, presentlyresiding at
7,Ladhani House, Prof.Almeida
Road, Bandra (West))
MUMBAI 400 050) ..RESPONDENTS

Mr. H.H. Ponda with S. Pasbola for petitioner
Ms. R. M. Gadhvi, APP
Mr. Himanshu Kamdi for R-2

CORAM: SMT. RANJANA DESAI, J.

DATED:-21/12/2006

ORAL JUDGMENT:

. Rule. Respondents waive service. Returnable forthwith. By consent of the parties taken up for hearing forthwith.

2. This petition is filed under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure 1973 ("Code" for short) by the petitioner who is the accused in the complaint No. 20/M/2006 filed by respondent 2 in Metropolitan magistrate 26th Court, Borivali, Mumbai, under Sections 307, 354, 326, 330, 323, 120(B), 109 read with 34 of the Indian Penal Code.

3. By order dated 26/6/06 the learned Magistrate accepted the report under Section 169 of the Code suggesting that no action is required to be taken against the petitioner. The said order was carried in revision before the Sessions Court, Mumbai being Revision Application No. 744 of 2006. The learned counsel for the petitioner requested that he may be heard. The learned Sessions Judge declined to hear him. By order dated 12/10/06 he directed that role of the petitioner be investigated and further

report be submitted to the learned Magistrate directly. Hence this petition.

4. The basic grievance made in this petition is that the learned Sessions Judge has disposed of the revision application filed by the original complainant who is respondent 2 herein without hearing the petitioner, who is accused 1.

5. My attention is drawn by Mr. Ponda to the provisions of Section 401 and Section 399 of the Code Relying on Section 401(2) of the Code Mr. Ponda contended that no order can be passed in revision application to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. Mr. Ponda submitted that as per Section 399 (2) of the Code to the revisions filed before the Sessions Judge, same principle will apply.

6. In support of his submissions Mr. Ponda relied on judgment of this court in **Balasaheb Keshav Thakre & Ors. v. Kusumbai Manikrao Deshmukh & Anr., 2000 ALL MR (Cri.) 662**, judgment of the Delhi High Court in **R. P. Sablok v. Smt. Kaushalya**

Talvar 1982 CRLJ 1342 and judgments of the Rajasthan High Court in **Kishan Lal v. State of Rajasthan RCC 1991-619**, **Jeet Singh v. State of Rajasthan & Anr. 1994(3) Crimes 540** and judgment of Punjab & Haryana High Court in **Sant Singh & anr. v. Gurmel Singh- Recent Criminal Report 1986(2) 514**.

7. Mr. Kamdi the learned counsel appearing for the 2nd respondent on the other hand submitted that no interference is necessary with the impugned order which is a well reasoned order. He further submitted that MHB Colony Police Station is not properly investigating the instant case and, therefore, a direction be given to the police. The learned APP on instructions from the officer who is present states that right steps will be taken henceforth in the light of the order of Sessions Court.

8. There can be no dispute about the proposition of law canvassed by Mr. Ponda. The provisions of law are very clear. Section 401(2) of the Code so far as it is material reads thus:-

"401. **High Court's powers of revision**

(1) . . . . .

(2). No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

(3) . . . . .

(4) . . . . .

(5) . . . . .

Section 399 so far as it is material reads thus:-

"399.**Sessions Judge's powers of revision:**

(1) In the case of any proceeding the record of which has been called for by himself the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the

provisions of sub-sections(2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) . . . . ."

9. It is clear from Section 401(2) of the Code that the High Court cannot pass any order to the prejudice of the accused or other person in its revisional power unless that person has had an opportunity of being heard either personally or by pleader in his own defence. Section 399 refers to Sessions Judge’s powers of revision. Sub-section (2) thereof states that where any poceeding by way of revision is commenced before a Sessions Judge, provisions of sub-section (2) of Section 401 shall, so far as may be, apply to such proceeding and reference to High Court in the said sub-section shall be construed as reference to the Sessions Judge. Therefore, even the Sessions Judge is obliged to hear the accused or other person, if he proposes to make any order adverse to that person while exercising his revisional powers. Such

person may be heard personally or through his lawyer.

10. I must also refer to the judgments to which my attention is drawn. In **Balasaheb Thakre's case (supra)** learned Magistrate had issued process against accused 4 under Section 500 of the I.P.C. but he had not issued process against the petitioners and they were discharged under Section 203 of the Code. This order was challenged in the Sessions Court by preferring a revision application. The Sessions Court allowed the revision application, set aside the order discharging the petitioners and issued process against the petitioners. This court observed that the petitioners were present before the Sessions Court through their advocate but they were not given opportunity of hearing. This court disapproved the fact that the Sessions Court had not given hearing to the petitioners therein. Following observations of this court are material:

> "On the last date of hearing of the revision petition, without assigning any reasons right of hearing is denied and that part of the judgment is not in

consonance with the judicial discipline. The Sessions Judge should have remembered that in view of the order being passed under Section 203 of Criminal Procedure Code by the Judicial Magistrate discharging them from the complaint and refusing to take cognizance of the offence, there is a right created in favour of the petitioners to protect the said order when it is challenged before the appropriate Forum namely before the Sessions Judge. By protecting the said order, petitioners protect themselves from the criminal prosecution which may have adverse effect on their reputation and status in the society, and, therefore, when adverse proceedings are being carried out by the Sessions Judge against the petitioners it was bounden duty of the Sessions Judge to hear the petitioners on merits and thereafter to pass the order. In view of these aspects, the order passed by the Sessions Judge stands vitiated and requires to be set aside."

11. In **R.P. Sablok's case (supra)**, in exercise of revisional jurisdiction, the Sessions Judge had set aside the order of dismissal of complaint and held that the accused/petitioner was liable to be summoned for an offence under Section 408 of the I.P.C. The said order was impugned by the accused-petitioner. The Delhi High Court observed that the impugned order was passed after hearing only the complainants counsel. The Delhi High Court referred to the amended provisions of subsection 2 of Section 401 of the Code. Reference was also made to Section 399 of the Code, which refers to Sessions Judge's powers of revision and inter alia states that subsection (2) of Section 401 shall, so far as may be apply to such proceeding and reference in the said subsection to the High Court shall be construed as reference to the Sessions Judge. The Delhi High Court observed that practice of not sending notice of the revision petition to the person who is likely to be prejudiced by any order passed by the court is not in accordance with law. The Delhi High Court clarified that it is mandatory for the Sessions Judge while exercising his powers of revision not to make any order which would prejudice the accused or other person unless he had been given an

opportunity of being heard.

12. In **Kishan Lal's case** the learned Magistrate had forwarded complaint under Section 156(3) of the Code to the police. The police registered the crime and started investigation. After investigation the police submitted a negative report under Section 169 of the Code against the petitioner. The complainant filed a revision petition in the Sessions Court. The petitioner was not given a notice. Without hearing the petitioner, the learned Sessions Judge observed that there was a prima facie case against the accused. He directed the learned Magistrate to take cognizance. The said order was impugned before the Rajasthan High Court. The Rajasthan High Court considered Sections 398 and 401 of the Code. The Rajasthan High Court observed that the order of the Magistrate accepting the negative report of the police is a judicial order and it also decides the rights between the parties. By such order, a right is created in favour of the accused as he stands exonerated from being proceeded in the criminal case and, if the said order is set aside, it is prejudicial to his interest as he is compelled to face trial. The

Rajasthan High Court referred to subsection (2) of Section 401 of the Code and observed that this provision also makes it obligatory for the Revisional Court to hear the accused. It was further observed that otherwise also, the principles of natural justice demand that no adverse order against the accused or any other person should be passed without giving an opportunity of hearing. The Rajasthan High Court set aside the impugned order after holding that the **order of the learned Sessions Judge is in contravention of the proviso to Section 398 of the Code as well as subsection (2) of Section 401 of the Code. The impugned order was thus set aside and the case was remanded to the trial court with a direction that the revision be heard afresh after giving an opportunity of hearing to the petitioner.**

13. Similar view has been taken by the Rajasthan High Court in Jeet Singh's case (supra) and by the **Punjab and Haryana High Court in Sant Singh's case (supra)**.

14. In view of the judgments to which my attention is drawn by Mr. Ponda and in the light of the relevant provisions of the Code to which reference

is made by me hereinabove I set aside the impugned order dated 12th October, 2006 passed by the learned Sessions Judge in Revision Application No. 744 of 2006 qua the petitioner, I direct the learned Sessions Judge to give a hearing to the petitioner or his counsel. The learned Sessions Judge shall hear the matter afresh and pass appropriate orders in accordance with law.

15. I make it clear that the impugned order is not set aside by me on merits. All contentions of both sides are kept open.

16. In the circumstances, the parties shall appear before the learned Sessions Judge on 8/1/07 and the learned Sessions Judge shall dispose it of as early as possible.

17. Petition is disposed of.

JUDGE.